

REPORTER'S TRANSCRIPT OF PROCEEDINGS

TUESDAY, OCTOBER 14, 2008

11 : 00 A.M.

17 APPEARANCES:

18 For the Plaintiff: WILLIAM W. FLACHSBART, ESQ.
ROBERT P. GREENSPOON, ESQ.

For the Defendants: ERIC A. BURESH, ESQ.
W. WEST ALLEN, ESQ.
ABRAN KEAN, ESQ.
RICHARD F. ZIEGLER, ESQ.
CHAD FEARS, ESQ.
NANCY ALLF, ESQ.
JAMES LEONG, ESQ.

24 Reported by: Joy Garner, CCR 275
25 Official Federal Court Reporter

1 **LAS VEGAS, NEVADA, TUESDAY, OCTOBER 14, 2008**

2 **11:00 A.M.**

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4 **P R O C E E D I N G S**

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6 THE CLERK: This is the time set for
7 the hearing of plaintiff's motion to strike and
8 dismiss, Civil Case Number 2:07-CV-1589-JCM-RJJ,
9 1st Media, LLC versus Dopi Karaoke, and all
10 others. Counsel, please note your appearance for
11 the record.

12 MR. FLACHSBART: Good morning, your
13 Honor, William Flachsbart on behalf of 1st Media.
14 With me today is my partner, Robert Greenspoon.

15 THE COURT: All right.

16 MR. ALLEN: Good morning, your Honor,
17 West Allen on behalf of Sony Computer
18 Entertainment American, Inc. I also today with
19 us Mr. Eric Buresh, Mr. Abe Kean from Shook,
20 Hardy and Bacon, and from Sony, Mr. James Leong.

21 MS. ALLF: Good morning, your Honor.

22 THE COURT: Good morning.

23 MS. ALLF: Nancy Allf appearing on
24 behalf Harmonix, and with me is Richard Ziegler
25 from Jenner and Block in New York.

1 THE COURT: All right, thank you. How
2 are you, sir?

3 MR. FEARS: Good morning, your Honor.

4 THE COURT: Good morning.

5 MR. FEARS: Chad Fears for Microsoft.

6 THE COURT: All right.

7 All right, I've reviewed the
8 file with my brain trust here. Let me tell you
9 what I'm inclined to do and then I'll give
10 everybody a chance to argue. This is the time
11 set for the hearing on plaintiff's motion to
12 strike and dismiss. I don't think this is an
13 appropriate motion to strike because under 12(f),
14 of course, that's the strike in pertinent -- let
15 me get the exact language -- redundant,
16 immaterial, and pertinent or scandalous matter.

17 So I think I've treated this
18 more as a motion to dismiss rather than a motion
19 to strike, but then additional material has been
20 submitted so I've treated it as a motion for
21 summary judgment. Of course, looking at it as a
22 motion to dismiss, the pleader is entitled to
23 have all the inferences drawn in its favor, and
24 the Court has to accept all those allegations as
25 true. Pleading as a motion for summary judgment,

1 then 1st Media must show that there are no
2 genuine issues of material fact and that you're
3 entitled to judgement as a matter of law.

First of all, dealing with the affirmative defense and counterclaim not being sufficiently pled, I think they are sufficient pled. Sony's amended answer outlines the number of patent applications submitted by Lewis that were reviewed and were rejected either during -- prior to or during the pendency of this application and also lists several references that were not disclosed by 1st Media. So it puts 1st Media on notice first of all, and it also describes in detail the basis for the allegations that were made.

16 This case seems to me to turn on
17 issues of fact, some of which are intent. I mean
18 intent first of all comes out and I think is
19 really going to be a linchpin here. And intent,
20 as the courts know, direct evidence of intent is
21 rare and a court often must infer intent from
22 surrounding circumstances, but intent also is
23 almost always a question of fact. What did the
24 parties intend here? And so that precludes
25 summary judgment.

1 Now, Sony claims that 1st Media
2 through Mr. Lewis, Mr. Scott Lewis, intentionally
3 deceived the patent office by withholding
4 information that would be relevant and material,
5 that office's investigation of a pending patent
6 application, and that allegation with other facts
7 in the amended answer I think, as I say, satisfy
8 our pleading standards and whether information --
9 whether the allegedly withheld information was
10 material, I think is a question of fact relying
11 on Scanner Technologies Corporation versus ICOS
12 Vision Systems Corporation, 528 F.3d 1365 at
13 1374. It's a 2008 case.

14 Of course, the question of
15 intent, the same case holds that intent is a
16 question of fact as well, and so I think that
17 there are questions of fact here dealing with
18 intent. Are these materials that were withheld
19 supposedly material? I think they're just too
20 many questions of fact that precludes summary
21 judgment. So based on that, I'm inclined to deny
22 the motion to strike and dismiss by 1st Media.
23 Now, it's your motion, Mr. Flashsbart (phonetic),
24 is that correct, sir?

25 MR. FLACHSBART: Flaksbart (phonetic),

1 your Honor.

2 THE COURT: Thank you. Mr. Flachsbart,
3 it's your motion so I'll give you a chance to
4 argue.

5 MR. FLACHSBART: Okay, I'll be brief.

6 (Reading.) I'm just going to eliminate a few
7 things.

8 THE COURT: Yes, sir. You don't know
9 me, but I try to give you a flavor of what
10 concerns the Court has rather than saying, okay,
11 argue away and then we'll just sit here. And I
12 know, I know, what the standard is, yeah, I know
13 what Rule 56 is, yeah, I know, I know, I know.
14 Oh, now, oh, wait, now you're to the interesting
15 part so --

16 MR. FLACHSBART: I completely
17 understand, your Honor, so what I'm going to do
18 is I'm just going to surf to the interesting
19 part.

20 THE COURT: Absolutely.

21 MR. FLACHSBART: I was going to talk a
22 little bit about the background of the case and
23 the patent, but I think we can dispense with
24 that.

25 THE COURT: Yeah, does everybody

1 understand? Is there anybody who doesn't
2 understand how the patent process works? Hold up
3 your hand. No hands? Okay, go ahead.

4 MR. FLACHSBART: So the only thing I
5 would like to focus on, your Honor, then is just
6 the Bell Atlantic case. I won't waste the
7 Court's time with anything else.

8 THE COURT: Okay, and let me just say I
9 don't know what the merits of this are. I mean
10 I'm not considering the merits and saying, oh, I
11 think that 1st Media did this or Sony did that.
12 I have no idea what the merits are. So I'm just
13 looking at this, here's a pleading and it's
14 almost in a vacuum, but now go ahead.

15 MR. FLACHSBART: I completely
16 understand that, your Honor, and that's why I
17 think I'll just focus on the Bell Atlantic.

18 THE COURT: Good.

19 MR. FLACHSBART: The reason that we
20 filed this motion is because of this emerging
21 standard that has come out of Bell Atlantic.
22 Some people call it Twombly, I'm going to call it
23 Bell Atlantic just that's my inclination.

24 THE COURT: That's fine.

25 MR. FLACHSBART: The Supreme Court is

1 sending this message to all of us that Rule 8 and
2 Rule 9 have teeth, that you can't just plead and
3 say particularly when you have a fraud type of
4 pleading like we do here. You can't just plead
5 intent and call it a day. You have to actually
6 have some facts that support that. If we look --
7 what struck me a lot while preparing for this
8 argument was how similar in some respects,
9 although the facts are not patent facts, the Bell
10 Atlantic case was to the instant case. In Bell
11 Atlantic we had a group of ILEX write these phone
12 companies that acted in concert apparently. In
13 other words, they all did sort of the same
14 prices.

15 THE COURT: That's right.

16 MR. FLACHSBART: And the plaintiff in
17 that case said, look, they all did the same
18 pricing. That leads me to conclude that they had
19 intent to do so. And so they must have been
20 acting in concert, therefore, we're going to sue
21 them under the appropriate statute, right, the
22 Beta One Statute. So in this case what do we
23 have? None of us -- I think the facts are
24 actually relatively agreed and as they are pled.
25 We have simultaneous pending patent prosecutions.

1 I have cited in some of the patents and not in
2 others, and then we have art that's identified to
3 the patentee if he didn't carry over to other
4 patents.

5 And from that fact -- from those
6 facts standing alone, Sony concludes intent, that
7 there was intent to deceive, that just because
8 they didn't carry them over, there's an intent.
9 What's curious to me is that's a lot like the
10 Bell Atlantic case. You've got some facts that
11 can be seen in the negative light, but don't
12 necessarily connote fraud, don't necessarily
13 connote any intent. We don't have any fact
14 that's pled that leads us to conclude that either
15 Dr. Lewis or Mr. Sawyer concluded at any time
16 that any of these references were material,
17 whether they then made the next step and formed
18 the intent to deceive by holding those back.

19 All we have is, look, it makes
20 sense in context. It's not inconsistent with
21 what happened that they could have formed the
22 requisite intent, but what the court said in Bell
23 Atlantic was that merely suggestive of conspiracy
24 wasn't enough, that the fact that you could tell
25 a bad story from the facts that you had without

1 being inconsistent wasn't sufficient because they
2 were equally plausible, if not more plausible,
3 non-damning explanations.

4 With respect to the ILEX, the
5 non-damning explanation was that they just did
6 what came naturally to them as companies, right,
7 that they sat because they were afraid of moving
8 because that would hurt them in the competitive
9 sphere. With Mr. Sawyer and Dr. Lewis there's an
10 equally compelling innocent explanation which is
11 that they thought of these different examinations
12 as completely different patents.

13 Now, we go into that at length
14 in our brief, and I'm certainly ready to talk
15 about it, but I think I can simply say if you
16 looked at nothing else, I'd like to have the
17 Court or its brain trust take a look at our
18 Exhibit S which is, you know, the comparison of
19 the claims that were alleged to be substantially
20 similar. So absent that intent, absent some
21 crystallizing fact that they have that says,
22 look, these guys chose to do bad things, we just
23 feel that under Bell Atlantic, they don't reach
24 the requirement that they crossed this line from
25 near plausibility into plausibility, and so we

1 tie those -- I mean that's why we're here.

2 THE COURT: Okay.

3 MR. FLACHSBART: If it weren't for Bell
4 Atlantic, we wouldn't be here because we agree
5 with your Honor in a lot of respects, and I
6 understand it's going to be hard to change your
7 mind, so I'm not going to waste a lot of time
8 doing it, but I wanted to point to that
9 particular parallel because I think it's that
10 parallel that really brings problems for Sony's
11 pleading and injects this very fraught issue into
12 what's otherwise, you know, a fairly basic patent
13 litigation.

14 THE COURT: All right.

15 MR. FLACHSBART: And with that, your
16 Honor, I'll conclude.

17 THE COURT: All right. Thank you.

18 How about on the defense side?
19 Is it Mr. Buresh?

20 MR. BURESH: It is Mr. Buresh, your
21 Honor.

22 THE COURT: Thank you.

23 MR. BURESH: Thank you. I'm obviously
24 not going to go through a full presentation at
25 this point.

1 THE COURT: Sure, that's fine. And, of
2 course, I want to hear your response primarily to
3 Mr. Flachsbart's argument.

4 MR. BURESH: Absolutely. The
5 defendants' response to that argument is that
6 Bell Atlantic versus Twombly did not change the
7 pleading standards. It did not change the
8 requirements that certain sets of facts be pled
9 according to a notice pleading standard and other
10 sets of facts, such as those encapsulated fraud
11 pleading are pled with particularity. It didn't
12 change that. And 1st Media is not attacking
13 Sony's pleadings as a motion to dismiss. They
14 are not attacking the sufficiency of the facts
15 we've pled. They are taking the next step and
16 saying, look, it's not plausible.

17 Bell Atlantic versus Twombly did
18 not instruct trial courts to take away a party's
19 right to discovery. They did not instruct courts
20 to take away a party's right to formulate and
21 fully articulate a claim. The purpose of a
22 pleading is not to articulate the legal theories
23 of the claim. The purpose of a pleading is to
24 articulate facts to put the other party on notice
25 such that they can formulate a defense. Sony's

1 pleading absolutely provided adequate notice for
2 formulate a defense. You see there 1st Media
3 providing a formulation. It's an incorrect
4 formulation, but it's a formulation of a defense
5 nonetheless.

6 The pleading standards are met.

7 Once you're to the plausibility issue, again I'm

8 going to refer you simply to slide 3, which the

9 Court alluded to in its opening, materiality, a

10 question of fact. Cumulativeness which was a big

11 argument, and cumulativeness just means the stuff

12 that the patentee didn't disclose was already

13 before the patent office in another form. Again,

14 question of fact, it goes to the scope and

15 content both of what wasn't disclosed and what

16 was already before the patent office. So it's a

17 question of fact, intent, as you alluded to, a

18 question of fact.

19 Now, Mr. Flachsbart alluded to,
20 and I believe focused, on the intent pleading and
21 said all Sony did was say there was a failure to
22 disclose and, therefore, there was intent. That
23 is far from the truth. What Sony did was plead a
24 consistent pattern of nondisclosure to the United
25 States Patent Office by either Dr. Lewis or the

1 agents that were working for Dr. Lewis. Just
2 briefly I want to give you kind of an atmospheric
3 picture of what occurred, and I was thinking on
4 the flight out here for people that don't
5 prosecute patents, what's a real world
6 explanation for what's going on.

7 My frame of reference is I have
8 four boys at home back in Kansas City. I raise
9 those four boys with my wife. One of the core
10 things we try to teach our kids is honesty as all
11 parents try to teach their kids. And honesty is
12 more than tricks. It's more than the punch line
13 that people have made it in jokes nowadays. It
14 is legitimate honesty is more than
15 technicalities. It's more than only telling what
16 you have to tell, but not telling the other part
17 that's really relevant.

18 When I raise my boys, I say --
19 you know, they come and ask me a question, Dad,
20 can I ride my bike down the street? I say no.
21 If my boy then goes to my wife and says, Mom, can
22 I can I ride my bike down the street? And she
23 happens to say yes, he just lied. He committed
24 in patent terms inequitable conduct. Why?
25 Because he didn't tell his mother that his dad

1 already said no. And if you take it a step
2 further, if mom says no, and he goes to grandad,
3 and grandad says, I don't care what you do, I'm
4 your grandad, go ride your bike. He's really
5 lied. He's not only not told him that mom said
6 no and dad said no, he's now misleading his
7 grandfather.

8 That in a practical term is what
9 we have here and that's what Sony has pled. I'm
10 sure you've reviewed the case of McKesson which
11 we talk about a lot in the pleadings. McKesson
12 stood for the simple holding that if you have
13 substantially similar claims in co-pending
14 applications, what does co-pending mean? Quite
15 simply, it's pending at the same time at the
16 patent office. If you have claims that are
17 substantially similar and they're rejected in
18 application A, application B, and then not
19 rejected in application C, you have to tell the
20 examiner in C what's going on in A and B.
21 Examiner C would want to know.

22 Materiality, what is
23 materiality? Is it anticipation? Does it mean
24 that every piece of a claim limitation has to be
25 in the reference? No. Materiality is simply

1 information that a reasonable examiner would
2 consider important. Would Examiner C want to
3 know what A and B were doing? Absolutely. Let's
4 first meet his response to that. They say, and
5 Mr. Flachsbart referenced this Exhibit S to show
6 that the claims are purportedly dissimilar.

7 I would refer the Court to the
8 slide number 7 of Sony's presentation. These
9 were the claims that were being compared by the
10 federal circuit in McKesson. These were the
11 claims that were found to be sufficiently similar
12 such that the rejections in the McKesson claim on
13 the left-hand side were relevant to the other
14 claim on the right-hand side, and if you look at
15 this, your Honor, there is several words that
16 overlap. There's system computer means that
17 overlaps if you turn the page with central
18 computer system. There's bay station means that
19 overlaps back on page 7 to bay station means.
20 That's the overlap.

21 Now, if you flip to page 9, this
22 is an example, one example, we've pled several,
23 but this is one of the examples of the asserted
24 claim in this case on the left-hand column, and a
25 co-pending application claim on the right-hand

1 column. You'll see an interactive multimedia
2 answering system, same element. I'm not going to
3 bore you with this. The claims clearly have far
4 more overlap than the claims in McKesson, and
5 with those types of overlapping claims preceding
6 through the patent office simultaneously, here's
7 what's happening.

8 You have a broad claim that
9 starts out in application A. Examiner A says
10 here's prior art, here's prior art, narrow that
11 claim down. And this is the claim you're left
12 with in A. The same thing is happening in B with
13 different prior art, the narrow claim at the end
14 of the day. And then we have application C
15 plugging along, prior art from A and B not cited,
16 rejections from A and B not cited. You have
17 multiple filings covering substantially similar
18 material, and Lewis or his agents, whoever is
19 responsible for this, did not tell the examiner
20 what was going on. And without a doubt, that
21 examiner would have wanted to know. That's what
22 Sony pled and that's why the motion should be
23 denied.

24 I would raise one more issue
25 which is in respect to the parties' joint

1 submission of a case management report which I
2 know doesn't go to your Honor but to the
3 magistrate, but we have asked in -- the
4 defendants have asked in the case management
5 report that we be permitted to take limited
6 special discovery on the issue of inequitable
7 conduct such that after we take that discovery,
8 we are enabled to present to the Court in an
9 appropriate dispositive fashion a resolution of
10 this case through the inequitable conduct claim.

11 This is not a trivial
12 inequitable conduct pleading. This is
13 significant conduct that occurred over a period
14 of time with a pattern that clearly evidences the
15 intent that Mr. Flachsbart so trivializes. At
16 the end of the day if we can resolve this case
17 through inequitable conduct, we avoid the rigors
18 of the standard patent case. If we can present
19 that to the Court early, we avoid a lot of the
20 hassles that are coming down the pike, claim
21 construction, discovery disputes, that type of
22 thing.

23 So we are asking for very
24 limited relief in the form of depositions of the
25 inventor and the prosecuting attorney so we can

see what their explanations are and, therefore,
present it to the Court. And I would just
highlight to the Court that there's an issue
because this motion was filed, and we didn't
anticipate this motion being filed, we submitted
the joint case plan that provided a proposed date
for those depositions to take place. Those are
passed already, or rather they approaching
passed. So I would simply note to the Court that
if you consult with the magistrate judge, to
alert him to that issue as well.

12 | Thank you very much.

18 Anybody else from the defense
19 side want to be heard on this? All right, Mr.
20 Flachsbart, I'll give you the -- it's your
21 motion, I'll give you the last bite.

22 MR. FLACHSBART: How about one minute?

23 THE COURT: Yes, sir.

24 MR. FLACHSBART: I won't spend more
25 than that. Sony consistently relies on -- and

1 this is with respect to the McKesson -- Sony
2 consistently relies on McKesson for this
3 principle that McKesson -- the McKesson court
4 found that the claims are substantially similar,
5 but that just never happened in McKesson. In
6 McKesson where they cite the substantially
7 similar language there, they're only restating
8 the district court's opinion. They weren't
9 actually adopting it and they never did adopt it.

10 The reason in the end that in
11 McKesson they were found to have possibly
12 committed inequitable conduct was that the other
13 prosecution was material because the claims show
14 the key feature patentability, okay? In other
15 words, it's not like our case where they're using
16 different features to argue patentability. In
17 the McKesson case using the same feature to argue
18 patentability in multiple cases and then
19 concluding that that gives rise to a potential
20 inequitable conduct by referring to rejections
21 from one claim over the other. So I think we
22 need to be precise about where we are when we're
23 talking about McKesson.

24 With respect to the discovery
25 plan, I mean obviously we think the discovery

1 plan should be taken up on its own because it
2 doesn't really have anything to do with where we
3 are today. I have found historically that
4 frequently defendants feel like, well, if we just
5 did discovery on the defense, we might then be
6 able to get rid of this whole case. That's
7 pretty much true of every defense regardless of
8 how well pled or not well pled. So I certainly
9 think it's a mistake. I think we'll take it up
10 as you suggest with the magistrate judge.

11 THE COURT: All right.

12 MR. FLACHSBART: Other than that, your
13 Honor, I'm prepared to conclude.

14 THE COURT: All right, thank you. And
15 do you want make this part of the record? I can
16 if you want to.

17 MR. BURESH: I don't believe it's
18 necessary, your Honor.

19 THE COURT: All right, and I'm
20 referring to the presentation.

21 MR. FLACHSBART: We object, your Honor,
22 we've never been given --

23 THE COURT: And I understand and it
24 would be just for what it's worth. I want to
25 give the parties a chance to put everything they

1 want to on the record. So rather than having --

2 MR. BURESH: If he's going to object to
3 it, I don't believe it's necessary to put it on
4 the record.

5 THE COURT: All right, thank you then,
6 but I --

7 MR. FLACHSBART: We obviously have no
8 trouble with your Honor referring to it.

9 THE COURT: I understand, I understand.
10 So I won't make it a part of the record then,
11 that's fine. But I'm inclined -- I'm still
12 inclined to deny the motion. There's issues here
13 that I think need to be fleshed out with
14 discovery, and I think that the intent is as the
15 courts hold is something that very often you must
16 infer, and it's -- it's -- I can infer it or not
17 here, but I just think it's improper for me to
18 try and infer it or try to infer its absence. I
19 think the defendants have pleaded enough, that
20 Sony has pleaded enough to defeat a motion to
21 dismiss or for summary judgment, and so I'm going
22 to go with my inclination and deny the motion to
23 strike and dismiss inequitable conduct
24 allegations. So, Mr. Allen, let me put the
25 burden on you to prepare an appropriate order to

1 that effect.

2 MR. ALLEN: Sure.

3 THE COURT: Now, as far as the
4 discovery, take that up with the magistrate judge
5 and I have no problem with expedited discovery or
6 something like that if the parties can agree on
7 it. If you can't, then again take it up with the
8 magistrate judge and see what he or she says.
9 This looks like it's Judge Johnston, so whatever
10 he says, and then any issues that need to come up
11 here, I can deal with them as well, all right?

12 MR. FLACHSBART: Just one point, your
13 Honor.

14 THE COURT: Yes, sir.

15 MR. FLACHSBART: Obviously if we're
16 treating this as a motion for summary judgment,
17 we may file another one.

18 THE COURT: Oh, absolutely, absolutely.
19 No, this is not I've cut off your right to file
20 another motion for summary judgment. No, it's
21 simply -- it's really a motion to dismiss and we
22 treat it under a different standard because you
23 file additional material. I mean that's the way
24 I construe it. So I don't construe it as now
25 you've got to come back with a motion to

1 reconsider and let's be realistic. You know, six
2 months from now this case is going to be in a
3 totally different posture because, oh, witness X
4 said this, you know, witness A said that. Oh,
5 that changes this, and now we respond this way.
6 And so I mean the case is going to be totally
7 different in six months.

8 MR. FLACHSBART: Absolutely, your
9 Honor. Thank you.

10 THE COURT: Yes, sir, thank you. It's
11 simply -- the way I do it is simply a different
12 standard because you filed additional material,
13 that's all it is.

14 All right, thank you, Gentlemen,
15 we will be in recess -- and Ms. Allif.

16 (Whereupon, the proceedings concluded.)

17
18 I hereby certify that pursuant
19 to Section 753, Title 28, United States Code, the
foregoing is a true and correct transcript of the
20 stenographically reported proceedings held in the
above-entitled matter.

21
22 Date: May 28, 2010

/s/ Joy Garner
JOY GARNER, CCR 275
U.S. Court Reporter

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